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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM DOCKET NO. 93-54
GAF BROADCASTING COMPANY, INC.	)	File No. BRH-910201WL
For Renewal of License of Station	)	
WNCN(FM) New York, New York	)	
CLASS ENTERTAINMENT AND	)	File No. BPH-910430ME
COMMUNICATIONS, L.P.	)	
For Construction Permit for a	)	
New FM Station on 104.3 MHz at	)	
New York, New York	)	

TO: The Commission

JOINT MOTION FOR APPROVAL OF AGREEMENT  
FOR DISMISSAL OF APPLICANT

GAF Broadcasting Company, Inc. (GAF) and Class Entertainment and Communications L.P. (Class), by their respective counsel hereby request the following relief:

1. Approval of the GAF/Class Agreement for Dismissal of Applicant (Attachment A hereto).
2. Dismissal of the Class application;
3. Grant of the GAF renewal application.

This motion is being filed with the Commission since its approval will require a waiver of Commission Rule 73.3523 relating to the timing for settlements in comparative renewal proceedings, and such a waiver would be beyond the authority of the presiding Administrative Law Judge. In addition, a separate settlement of a court appeal involving Class, GAF and the Commission is already before the Commission. For these reasons, GAF and Class believe it is appropriate to submit this motion to the Commission. By accompanying motion, GAF and Class are also requesting the Commission to hold in

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abeyance or stay the hearing proceedings pending action on this motion since approval of the settlement agreement would resolve the proceeding.

Approval of the subject settlement agreement would, under prior long-standing Commission policy and practice, have been straight forward and routine. Thus, Attachment B is the requisite Declaration from Class General Partner, James Dowdy, verifying that: (1) the amount of consideration proposed be received for dismissal of the Class application, \$40,000, is substantially less than Class' actual fees and expenses incurred (\$76,637)<sup>1</sup> in preparing, filing, and prosecuting its application, and (2) the Class application was not filed for

The principal reasons advanced to justify such a waiver are as follows: (1) The facts and circumstances on which Class had based its challenge have drastically changed. The Class application was predicated on a conviction of GAF's parent company and one of its former officers for criminal violations of federal securities law. Those convictions were subsequently overturned on appeal, after the U.S. Court of Appeals for the Second Circuit determined that the trial judge's prejudicial errors had denied GAF a fair trial. After its petition for rehearing was denied, the U.S. Department of Justice decided not to seek a further trial of the defendants. Moreover, the Commission subsequently ruled that it would not hold a hearing on the underlying conduct involved in the original convictions. The Commission has traditionally recognized that changed circumstances, particularly those over which an applicant has no control, are grounds for relief; (2) the amount of consideration involved is relatively small, representing less than full reimbursement; and (3) the Commission's long-standing policy encouraging settlements as expressed in RKO and other proceedings would be served. GAF and Class are the only applicants<sup>2</sup> remaining in the case, and approval of the settlement would resolve the proceeding.

It should be emphasized that the concern as to abusive applicants is not present here. No party has ever alleged

~~that Class is not entitled to a hearing on its application.~~

no disqualifying or other issues were ever requested or specified against Class. Moreover, Class has General Partners who would be asserting full-time integration credit, with minority, local residence, and civic activity enhancements. Class is thus a serious applicant which has proceeded in an appropriate manner. The factor which led to the settlement was the changed material circumstances over which Class had no control. The parent GAF conduct involved and the court proceedings are set forth in detail in the Commission Memorandum Opinion and Order (FCC 92-185), released May 28, 1992. As set forth therein, the parent GAF and former officer James T. Sherwin were convicted December 3, 1989, and on December 19, 1990, the Commission's Mass Media Bureau had directed a letter to GAF Broadcasting seeking to assess the relationship between the then-convicted corporate parent and its broadcast subsidiary. Subsequently the convictions were overturned due to the judge's prejudicial errors, and with the decision by the U.S. Attorney's Office not to seek a new trial, a court order dismissing the indictment and terminating the proceeding against the parent GAF and Sherwin was signed August 9, 1991. Class then made the argument that the alleged conduct should nevertheless be considered, which position the Commission rejected in the aforementioned May 28, 1992 ruling. These changed circumstances obviously and dramatically altered Class' chances of prevailing in a comparative renewal context, particularly with regard to a station such as WNCN with a classical music format.

The settlement agreement thus represents a recognition of the reality of the changed circumstances on the part of Class, and a desire by GAF to resolve the matter and secure a full-term renewal. There does not appear to be any public interest objective which would be served by prolongation of this case. Nor would approval here serve as a broad precedent since the key factors are a change in material circumstances outside the control of the dismissing applicant and a modest reimbursement level which is less than 100% of fees and expenses. No basic qualifying issues have been designated or added against GAF, which remains fully qualified to continue as licensee of WNCN.

For all reasons, prompt approval of the settlement agreement would be in the public interest.

Respectfully submitted,

GAF Broadcasting Company

BY Arthur H. Harding By M.L.B.  
Aaron I. Fleischman  
Arthur H. Harding  
Christopher G. Wood

Fleischman and Walsh  
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(202) 939-7900

CLASS ENTERTAINMENT AND  
COMMUNICATIONS, L.P.

BY Morton L. Berfield  
Morton L. Berfield

Cohen and Berfield, P.C.

ATTACHMENT A

AGREEMENT FOR DISMISSAL OF APPLICATION

WHEREAS, GAF Broadcasting Company, Inc. ("GAF") has pending before the Federal Communications Commission ("Commission") an application for renewal of license for FM radio station WNCN, New York, New York (File No. BRH-910201WL);

WHEREAS, Class Entertainment and Communications, L.P. ("Class") has pending before the Commission a competing application for construction permit to operate on the FM frequency now licensed to GAF (File No. BPH-910430ME);

WHEREAS, the GAF and Class applications have been designated for a comparative hearing in MM Docket No. 93-54;

WHEREAS, GAF and Class desire to settle and resolve this hearing by entering the present agreement ("Agreement");

WHEREAS, GAF and Class acknowledge that the effectuation of such settlement will require prior Commission approval of the Agreement and waiver of the settlement limits imposed by Section 73.3523(b) of the FCC rules;

WHEREAS, GAF and Class believe that waiver of Section 73.3523(b) would be justified by the circumstances present here, and that the public interest would be served by the settlement proposed by this Agreement; and

WHEREAS, in consideration of the mutual promises contained herein, it is hereby agreed this 10<sup>th</sup> day of June, 1993, as follows:

1. Class agrees within five (5) business days of execution of this Agreement to request the Commission to dismiss its competing application (File No. BPH-910430ME) pursuant to this Agreement;

2. GAF agrees to pay Class the sum of Forty Thousand Dollars (\$40,000) in immediately available funds if the Commission should approve this Agreement, or such lesser amount as the Commission may approve, such payment to be made within three (3) business days of Commission approval of this Agreement having become a final order (i.e., an order no longer subject to administrative or judicial review or appeal). In the event that the Commission approves this Agreement but the Class Application (File No. BPH-910430ME) is dismissed by the Presiding Judge in MM Docket No. 93-54 for failure to prosecute or otherwise prior to such approval, Class shall nonetheless be entitled to receive said \$40,000, or such lesser sum as the Commission may approve, as consideration for having moved for dismissal of its application.

3. Class and GAF shall execute the supporting affidavits required by Section 73.3523 of the FCC Rules, file a joint request for waiver of the settlement limits imposed by that Rule, and request approval of this Agreement, within five (5) business days of execution of this Agreement; shall promptly provide such other information as the Commission may require; and shall take such other steps as may reasonably be needed to obtain approval of the Agreement in a timely manner.

4. Class hereby warrants, and GAF acknowledges its understanding that, the agreed upon \$40,000 represents an amount less than Class's reasonable and prudent expenses in preparing, filing and prosecuting its competing application.

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5. Class hereby warrants that it did not file its application for the purpose of reaching or carrying out this Agreement.

6. Class and each of its current General and Limited Partners agree, collectively and individually, that they will not again file, nor will they join, cooperate with or encourage any third party to file a competing application for the frequency occupied by WNCN in New York City during the present license term expiring June 1, 1998, nor during the next succeeding license term expiring June 1, 2005, in accord with Intercontinental Radio, Inc., 62 RR 2d 1565 (1985). Prior to closing, Class and each of its current General and Limited Partners shall provide written assent to this provision.

7. The parties hereto agree that if any provision of this Agreement is unacceptable to the Commission, they shall exercise their best efforts in good faith to achieve a mutually acceptable reformation of this Agreement consistent with carrying out the purposes hereof.

8. This Agreement may be executed in one or more counterparts which, taken together, shall constitute one and the same Agreement.

GAF BROADCASTING COMPANY, INC.

By: \_\_\_\_\_

CLASS ENTERTAINMENT AND  
COMMUNICATIONS, L.P.

By: \_\_\_\_\_

James H. Dowdy,  
General Partner

ATTACHMENT B

DECLARATION

James H. Dowdy, under penalty of the laws of perjury, hereby declares as follows:

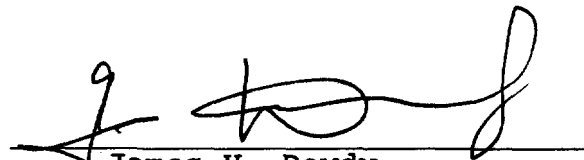
I am a General Partner in Class Entertainment and Communications, L.P. (Class), an applicant for construction permit for a new FM broadcast station at New York, New York (BPH-910430 ME), which is mutually-exclusive with the application of GAF Broadcasting Company, Inc. (GAF) for renewal of license of FM station WNCN, New York, New York (File No. BRH-910201LW) before the Federal Communications Commission (Commission).

The Class application was not filed for the purpose of reaching or carrying out an agreement with GAF or any other applicant regarding the dismissal or withdrawal of its application. The Class application was filed essentially on the basis of the conviction of the former parent corporation of GAF and one of its officers and directors for violations of federal law. Those convictions were overturned on appeal and the government did not seek a further trial. Moreover, the Commission later declined to hold hearings on the underlying conduct. As a result of these changed circumstances, Class has determined that it is in the interest of all parties and the Commission to dismiss its application, and Class has entered into a written agreement with GAF which

provides for payment of \$ 40,000 for such dismissal.

Class' reasonable and prudent expenses in prosecuting its application total \$ 76,637 and thus Class is receiving substantially less than its expenses. Neither Class nor any of its principals is receiving any other consideration from GAF. It is noted that Class and GAF have also entered into an agreement for dismissal of the court appeal and related petitions, which agreement is, of course, also being filed with the Commission.

A breakdown of Class' application expenses is attached hereto.



James H. Dowdy  
General Partner

June 10, 1993

ATTACHMENT A

Class Entertainment and Communications, L.P.

Application Expenses

Consulting Engineer - R F Projects Corporation	\$ 8,525
E and R Stanfield Corporation - Financial, Budget and Program Consultants	\$ 10,225
FCC Filing Fee and Hearing Fee	\$ 8,790
Accounting, Newspaper publication of Notice of Application and Notice of Hearing, State of Delaware fees, taxes bank charges, supplies and stationery and travel related to application	\$ 8,382
Cohen and Berfield, P.C. Fees and expenses	\$ <u>40,715</u>
Total	\$ 76,637

ATTACHMENT B TO DOWDY DECLARATION

DECLARATION

Morton L. Berfield, under penalty of the laws of perjury, declares as follows:

Our law firm, Cohen and Berfield, P.C., represents Class Entertainment and Communications, L.P. (Class), and I serve as the principal attorney for Class. With regard to the Class application (File No. BPH-910430 ME) our law firm has provided legal services of \$37,800 at our customary rates plus out-of-pocket expenses (copying, postage, telephone, and travel) of \$2,915, for a total of \$40,715. The legal services included preparation and filing of the Class application, including the preparation of the limited partnership agreement, working with the consulting engineer and the financial budget and program consultants, assisting with obtaining the antenna site, preparation of Notice of Application, preparation of integration, financial, and ownership amendments to the application and pleadings related to the Class integration amendment. Following designation of a hearing, services have included preparation of Notice of Designation, representation at pre-hearing conference, preparation and filing of Integration/Diversification Statement, Request for Documents, Notice of Depositions, and review of Request for Documents and Notice of Depositions filed by the renewal applicant.

  
Morton L. Berfield

Date:

June 21, 1993

CERTIFICATE OF SERVICE

I, Susie Cruz, do hereby certify that on the 25th day of June, 1993, a copy of the foregoing "Joint Motion for Approval of Agreement for Dismissal of Applicant" was hand delivered to the following:

Norman Goldstein, Esq.  
Gary Schonman, Esq.  
Hearing Branch  
Federal Communications Commission  
2025 M Street, NW, Room 7212  
Washington, DC 20554

  
Susie Cruz